

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

GVS PROPERTIES, LLC

and

Case No. 29-CA-077359

INTERNATIONAL ASSOCIATION of MACHINISTS
AND AEROSPACE WORKERS, AFL-CIO, DISTRICT
LODGE 15, LOCAL LODGE 447

Colleen P. Breslin, Esq. and Genaira L. Tyce, Esq., of Brooklyn, NY,
for the Acting General Counsel.

James M. Conigliaro, Jr., Esq., of Brooklyn, NY,
for the Charging Party.

Jonathan D. Farrell, Esq. of Mineola, NY,
for the Respondent-Employer.

DECISION

Statement of the Case

Kenneth W. Chu, Administrative Law Judge. This case was tried before me on August 14, 2012¹ in Brooklyn, New York pursuant to a Complaint and Notice of Hearing issued by the Regional Director for Region 29 of the National Labor Relations Board (“NLRB”) on May 31. The complaint, based upon a charge filed on March 23 by the International Association of Machinists & Aerospace Workers, AFL-CIO, District Lodge 15, Local Lodge 447 (the Charging Party or Union), alleges that GVS Properties, LLC (the Respondent or Employer), has engaged in certain violations of Section 8(a)(5) and (1) of the National Labor Relations Act (“NLRA” or the “Act”) by failing and refusing to bargain collectively with the Union. The Respondent filed a timely answer to the complaint denying that it had committed any violations of the Act.²

¹ All dates are in 2012 unless otherwise indicated.

² In a separate action, the Regional Director of Region 29 of the NLRB petitioned the United States District Court Eastern District of New York for a preliminary injunction under the Act §10(j) against GVS Properties. *Paulsen v. GVS Props. LLC*, E.D.N.Y. 12-cv-4845 (November 13, 2012). By Memorandum Decision and Order issued by District Judge Cogan, the injunctive relief petition under §10(j) was denied and the case dismissed. Subsequently, the Respondent moved to dismiss this complaint consistent with Judge Cogan’s decision which found that GVS was not a *Burns* successor and therefore not obligated to bargain collectively with the Union. The Acting General Counsel submitted an opposition to the dismissal motion on November 19. I find that the §10(j) action was taken independent of the complaint filed with the Board and the issue before the Board is very different from the injunctive relief sought in the federal court. The proceeding in the district court “...is merely ancillary and the decision in such proceeding is not res judicata upon the final hearing in a complaint case before the Board, because in an application for interlocutory and temporary relief under Section 10(j) or 10(l), the court does not undertake to pass upon

Continued

Issue

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act when it failed and refused to bargain collectively with the Union. The issue is whether an employer who is statutorily mandated to hire its predecessor's employees for at least 90 days under the New York City's Displaced Building Service Workers Protection Act ("DBSWPA") is obligated to bargain with the recognized and exclusive bargaining representative of its predecessor's employees.

Post-trial briefs were timely filed by Respondent, Charging Party and Acting General Counsel and have been carefully considered. On the entire record, including my observation of the demeanor of the witness, and after considering the briefs filed by the parties, I make the following

Findings of Fact

I. Jurisdiction and Labor Organization

The Respondent, a New York corporation, engaged in the ownership of real estate properties in Manhattan, New York, where it annually derived gross annual revenue in excess of \$500,000 and receives at its New York facilities goods and supplies valued in excess of \$5,000 directly from enterprises located outside of New York State. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

The Respondent owns real estate properties throughout New York City. At all material times, the New York facilities at issue in this case consisted of 601 West 139th Street, 6104 West 157th Street, 600 West 161st Street, 559 West 164th Street, 701 West 175th Street, 700 West 176th Street, and 667 West 177th Street (hereinafter, the "New York facilities").

The New York facilities were previously managed by Vantage Building Services, LLC and had a collective bargaining agreement with the Union (Jt Exhibit 2).³ The previous owner, Broadway Portfolio I Owner, LLC, sold the New York facilities to Respondent GVS on or about

the merits of the principle controversy." *DuBosie Chemicals Inc.* 144 NLRB 56, 59 (1963). As a consequence, I find it has no bearing to the outcome of this trial. I am bound only to apply established Board precedent which the Supreme Court has not reversed, notwithstanding contrary decisions by the lower courts. *Waco, Inc.*, 273 NLRB 746, 749 fn.14 (1984). I deny the Respondent's motion to dismiss and render this decision on the merits for the reasons set forth herein. *Detroit Newspaper Agency*, 330 NLRB 524, 525 (2000).

³ For ease of reference, testimonial evidence cited here will be referred to as "Tr." (Transcript) followed by the page number(s). At trial, the parties jointly presented a stipulation of facts and referred to as "Joint Exhibit 1 ("Jt Exh" 1) and entered into the record upon due review. In addition, Respondent submitted a binder of documents that was made part of the record as Respondent Exhibit 1 ("R Exh"). References to the documents in R Exh 1 are indicated by page numbers. General Counsel's exhibits are identified as "GC Exh."

February 17. Under Respondent, the New York facilities have been managed by Alma Realty Corp (Tr. 18). Since March 7, Respondent has refused to recognize the Union as the collective bargaining representative.

5

B. Stipulated Facts

The complaint alleges that Respondent has failed to recognize and bargain with the Union as the exclusive bargaining representative since on or about March 7 (GC Exh 1). As noted, the parties submitted a set of stipulated facts made part of the record (Jt Exh 1).

10

At all material times until on or about February 17, 2012, the facilities were managed by Vantage Building Services, LLC (hereinafter “Vantage”). During the times that Vantage managed the facilities, Vantage employed employees in a bargaining unit described as follows (Jt Exh 1, Stipulation ¶ 7):

15

All full-time superintendents and porters (also known as maintenance, technicians and maintenance assistants, respectively) and excluding all other employees, clerical employees, managerial employees, guards and supervisors as defined by the Act, employed at the Respondent’s New York facilities.

20

During all times that Vantage managed these facilities, employees in the bargaining unit described above were responsible for the daily service, maintenance, repair and upkeep of the New York facilities (Jt Exh 1, Stipulation ¶ 10). At all material times since at least May 1, 2010, until on or about February 17, 2012, the Union was the collective bargaining representative of employees in the bargaining unit as described above for the purposes of collective bargaining with respect to pay, wages, hours of employment and other terms and conditions of employment, and was recognized as such representative by Vantage. Such recognition was embodied in a collective bargaining agreement effective from May 1, 2010, to April 30, 2013 (Jt Exh 1, Stipulation ¶ 11).

30

On or about February 17, Respondent purchased said facilities from Broadway Portfolio I Owner, LLC and on February 18, Vantage relinquished and Respondent assumed management of said facilities through Alma Realty Corp, a real estate management firm. When Respondent assumed Vantage’s management operations, there were eight employees who worked in the unit. Respondent hired seven of the eight unit employees when it assumed Vantage’s operations (Jt Exh 1, Stipulations ¶ 12, 13). The names of the seven unit employees hired by Respondent are: Elvis Baez, Juan Castillo, Jose Cepeda, Harol Jimenez-Maderas, Carlos Manuel Laureano, Juan Rivera, and Roberto Sacaza Diaz.

35

40

At all material times since February 18 through on or about May 17, the employees hired by Respondent were responsible for the daily maintenance, repair and upkeep of the New York facilities. At the time Respondent assumed Vantage’s management operations on or about February 18, Respondent did not hire any additional employees within the unit (Jt Exh 1, Stipulations ¶ 15 18). At all times since February 18, Respondent has owned the facilities described above and has exercised day-to-day supervision and control over all matters and decisions related to the terms and conditions of employment of the unit. From on or about February 18 through May 17, a majority of Respondent’s workforce consisted of the employees employed by Vantage as noted above (Jt Exh 1, Stipulations ¶ 19, 21).

45

50

Respondent informed the seven unit employees named above, by separate letters all dated February 17 that they would no longer be employed by Vantage and that if they wished to continue working at the properties; they would be required to inform Nicholas Conway by

February 27. At the time, Conway was employed by the Alma Realty Corp. and was the Operations Manager for Respondent's New York facilities (Tr. 18). The February 17 letters also informed the seven individuals that all terms and conditions related to their wages, hours, work rules and working conditions under Vantage were revoked and nullified in their entirety.

Respondent had unilaterally set forth new terms and conditions of potential employment for the seven individuals (R Exh 1 at 32-39). In pertinent part, the letter read:

On or about February 18, 2012, GVS Properties, LLC will assume management of the properties located at (the New York facilities)...Accordingly, effective February 18, 2012, you will no longer be employed by your current employer—Vantage Building Services, LLC—to work at these property (ies).

Should you wish to continue working at the property(ies), you must contact Nicholas Conway...If you do not contact Mr. Conway by February 27, 2012, GVS Properties will conclude you do not wish to be considered for work or employed by GVS Properties and we (GVS Properties) will act accordingly.

Please realize all terms and conditions related to your wages, hours, work rules and working conditions with Vantage are revoked and nullified in their entirety. GVS Properties is therefore unilaterally and without review setting your initial terms and conditions of your (possible) employment with GVS Properties. To the extent any of your prior wages, hours, work rules and working conditions conflict with the wages, hours, work rules and working conditions established by GVS Properties, the wages, hours, work rules and working conditions by GVS Properties shall govern.⁴

Employees of Vantage who have applied to GVS Properties for employment and provided GVS Properties all relevant paperwork will be hired on a temporary and trial basis in accordance with their prior seniority, within a specific job classification—as those terms are generally defined in labor relations—with Vantage. Any former employees of Vantage not hired by GVS Properties will remain on a preferential hiring list for such temporary positions for a period of ninety (90) days, commencing on or about February 18, 2012.

Respondent hired the employees noted above pursuant to the New York City Displaced Building Service Workers Protection Act ("DBSWPA") (Jt Exh 1, Stipulations ¶ 17).

In relevant part, DBSWPA states:

(b)(5) A successor employer shall retain for a ninety (90) day transition employment period at the affected building(s) those building service employee(s) of the terminated building service contractor (and its subcontractors), or other covered employer, employed at the building(s) covered by the terminated building service contract or owned or operated by their former covered employer.

(b)(6) If at any time the successor employer determines that fewer building service

⁴ The new wages and employee benefits substantially deviated from the collective bargaining agreement. For example, Respondent reduced wages for the superintendents from \$15.00 per hour to \$10.00 and for the Porters from \$12.00 to \$8.00 per hour. In addition vacation time, paid sick leave, and paid holidays were reduced and welfare benefits were eliminated (R Exh 1 at 50, 51).

employees are required to perform building services at the affected building(s) than had been performing such services under the former employer, the successor employer shall retain the predecessor building service employees by seniority within job classification; provided, that during the 90-day transition period, the successor employer shall maintain a preferential hiring list of those building service employees not retained at the building(s) who shall be given a right of first refusal to any jobs within their classifications that become available during that period.

(b)(7) Except as provided in part (6) of this subsection, during such 90-day period, the successor contractor shall not discharge without cause an employee retained pursuant to this section.

(b)(8) At the end of the 90-day transition period, the successor employer shall perform a written performance evaluation for each employee retained pursuant to this section. If the employee's performance during this 90-day period is satisfactory, the successor contractor shall offer the employee continued employment under the terms and conditions established by the successor employer or as required by law. NY Code §22-505 (Jt Exh 2).

Essentially, DBSWPA requires successor employers to retain building services employees (non-supervisory workers) of the predecessor for a period of 90 days subject to termination for cause or a decision to operate with fewer employees. It also obligates the purchaser to perform a written performance evaluation for each retained employee after the 90 days is completed, and to offer continued employment to any employee who receives a satisfactory evaluation. DBSWPA does not require the new employer to retain the predecessor's wages, terms and conditions of employment. DBSWPA contains an opt-out provision exempting employers who are willing to become subject to a collective bargaining agreement that contains provisions regarding the discharge or layoff of employees. The intent of DBSWPA is to provide job security to building employees in New York City by requiring successor building owners to offer employment to its predecessor's employees.

Conway testified he was responsible for overseeing the staff, dealing with tenant issues, and with the hiring and discharging of employees. He was ultimately responsible for either retaining or terminating the unit employees (Tr. 18, 19). Conway stated that he offered employment to seven of the eight employees who were terminated. He stated that the offer of employment was made because he was required to hire the predecessor's unit employees under DBSWPA (R Exh 32-45); (Tr. 25). He noted that one of the eight unit employees was not hired.⁵ Conway stated that the eighth employee was not hired because he felt that the properties could be maintained with fewer employees. He testified that DBSWPA allows the successor employer to hire fewer employees based upon operational needs to perform building services (Tr. 29-33).

Conway said that the seven employees hired from the predecessor were considered permanent employees, subject to a 90 day evaluation period (R Exh 1 69-104). He specifically testified that "They were not probationary employees" (Tr. 35).

By letter dated March 7, the Union requested that Respondent recognize and bargain

⁵ There are no pending charges and none have been alleged in this complaint that the non-hiring of the eighth Vantage employee by Respondent was a violation of the NLRA.

with it as the exclusive collective bargaining representative of the unit (R Exh 1 66). The General Counsel for the Union, James M. Conigliaro, states in his letter to Conway:

I am writing to you regarding Vantage Building Services, LLC and your recent assumption of their management responsibilities. Specifically, the Union has been informed that you have sent correspondence to its members regarding changes to their terms and conditions of employment as set out in their collective bargaining agreement.

As proscribed under federal labor laws and as a result of the existing collective bargaining agreement with Vantage, the Union demanded bargaining with your company (GVS Properties/Alma) regarding the terms and conditions of employment of its members.

By letter dated March 13, Respondent informed the Union that it did not recognize the Union as the collective bargaining representative of employees in the defined unit. Since March 7, Respondent has refused to recognize and bargain with the Union as the collective bargaining representative of the unit (Jt Exh 1, Stipulations ¶¶ 22, 23).

Subsequently, Respondent terminated three of the seven unit employees at the end of their 90 day evaluation period.⁶ Respondent terminated Carols Manuel Laureano and Elvis Baez on May 16 and Juan Rivera on May 17 (R Exh 105-111); (Tr. at 36-38). Respondent subsequently replaced the three terminated employees by hiring four new employees on May 17 (Jt Exh 1, Stipulations ¶¶ 26, 27). Conway explained that he hired one additional employee because he felt that one building was understaffed (Tr. at 41-44).

Respondent has not engaged in collective bargaining with the Union after hiring the four new employees. Conway testified that none of the four new employees expressed any interest to him about joining the Union and that he was not aware if the Union had asked the new employees to complete dues authorization cards (Tr. at 48, 49).

Discussion and Analysis

A. Section 8(a)(5) and (1) Allegations

The Acting General Counsel, at Paragraphs 15 and 16 in the complaint, alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union as the exclusive collective bargaining representative of the defined unit. The Acting General Counsel states that Conigliaro requested on March 7 that Respondent bargain with the Union regarding the terms and conditions of employment of its members (the unit) (R Exh 1 at 66). The Respondent refused to recognize and bargain with the Union by letter dated March 13. It is not in dispute that the Union represented the unit employees of the predecessor. The Acting General Counsel has maintained that since March 7, the Respondent has failed and refused to recognize and bargain with the Union.

B. Respondent's Arguments

The Respondent does not deny that it refused to bargain as alleged. The Respondent argues that was required to hire the predecessor's unit employees under DBSWPA. The

⁶ There is no allegation in this complaint that the discharge of the three employees on May 16 and 17 was a violation of the NLRA.

Respondent contends that under DBSWPA, it was "...legally prohibited from establishing its initial compliment (sic) of employees which would (or would not) establish whether the Respondent was a *Burns* successor..." (See, Respondent's Answer to the complaint at GC Exh1). Respondent informed the Union in a letter dated March 13, that it did not recognize the Union as the collective bargaining representative of the unit employees. In the letter, counsel for Respondent states:

Please be further advised in accordance with the New York City Displaced Building Service Workers Protection Act ("DBSWPA") (§22-505 of the Administrative Code of the City of New York), GVS is currently evaluating the performance of the former employees of Vantage Building Service LLC (or its related entities). Upon the conclusion of ninety (90) day evaluation period, as mandated and set forth in DBSWPA, GVS will determine its staffing needs as well as decide who will be offered positions of employment. Accordingly, at this juncture it is unclear whether District 15, Local 447 International Association of Machinists and Aerospace Workers, AFL-CIO ("Local 15") is a *Burns* Successor...Said ninety (90) day evaluation period will conclude on or about May 17, 2012. Upon the conclusion of the ninety (90) evaluation period, and the offer of a more permanent position, GVS will determine if it has a bargaining obligation with Local 15 (R Exh 1 at 67, 68).

The Respondent does not dispute the fact that it had hired a majority of the predecessor's unit employees. The Respondent argues it was not a *Burns* successor. The Respondent contends that it was not a *Burns* successor when it hired a majority of the predecessor's unit employees "...because the hire of the said employees was required and mandated by DBSWPA and the Respondent would not have hired a substantial and compliment (sic) of employees until after March 13, 2012, i.e., some time after the conclusion of the ninety (90) day DBSWPA period" (Jt Exh 1, Stipulation ¶ 24). The Respondent maintains that a *Burns* successorship results from the voluntary decision of a new employer to hire a majority of the predecessor's workforce and not from a mandate to hire the predecessor's majority workforce as required under DBSWPA.

As stipulated, upon the conclusion of the 90 day DBSWPA period, the Respondent terminated three employees on May 16, 17. Respondent then hired four new employees (Jt Exh 1, Stipulations 26, 27). As a result, the Respondent argues that there was no majority of the predecessor's unit employees after the 90 day period to require bargaining with the Union.

C. Respondent violated Section 8(a)(5) and (1) of the Act
by failing and refusing to bargain with the Union

In *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972), a successor employer must bargain with the employee representative when it becomes clear that the successor has hired its full complement of employees and that the union represents a majority of those employees. The Board has held that when a business changes hands, the successor employer must take over and honor the collective bargaining agreement negotiated by the predecessor. In *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987), the Supreme Court clarified the *Burns* doctrine and held that an employer that purchases the assets of another is required to recognize and bargain with a union representing the predecessor's employees when 1) there is a substantial continuity of operations after the takeover and 2) if a majority of the new employer's workforce in an appropriate unit, consists of the predecessor's employees at a time when the successor has reached a substantial and representative complement. Under *Burns*, determining whether a new company is a successor "is primarily factual in nature and is based upon the totality of the circumstances of a given situation." *Fall*

River Dyeing, 482 U.S. at 43. Thus, a finding of successorship imposes an obligation on the Respondent to bargain with the union of its predecessor. Absent discrimination, even a successor is ordinarily free to set the initial terms on which it will hire the employees of a predecessor and "...is not bound by the substantive provisions of the predecessor's collective bargaining agreement." *Burns Int'l Sec. Servs., Inc.*, at 272, 294.

The rule of successorship imposes an obligation on the Respondent to bargain with the union of its predecessor. *Fall River Dyeing*, 482 U.S. at 36. "If the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor, then the bargaining obligation of 8(a)(5) is activated. This makes sense when one considers that the employer intends to take advantage of the training work force of its predecessor." *Id.* at 41-42.

I find that the Respondent violated Section 8(a)(5) and (1) of the Act when it failed to recognize and bargain when the Union demanded bargaining on March 7. As stipulated, and I find, that there were both continuity in the workforce and continuity of the business enterprise when Respondent purchased the New York facilities. The unit employees were performing the same jobs, tasks and duties in the same buildings prior to and after the purchase of the New York facilities.

With this background, it is abundantly clear that New York's DBSWPA was never intended or designed for a successor employer to circumvent or to avoid its obligation to bargain collectively with a recognized union. The DBSWPA was enacted due to the effects of "...September 11 and the deepening recession [which] have been devastating for low income New Yorkers." The findings also noted that "The volatility of the real estate industry coupled with new trends in the service economy are undermining stable employment relationships and creating a drain on an already overburdened social service system. At a time of great uncertainty, it is the policy of the City to promote stability in employment for building service workers, which will reduce the need for social services resulting from unemployment, and promote stability in the service industry." See, DBSWPA *Historical Note* in R Exh 1.

As such, DBSWPA was intended to protect building service employee job security and stability by requiring successor building owners to offer employment to its predecessor's employees for a 90 day probationary period and allows the employer to evaluate the employees after 90 day as to whether to retain or dismiss the employee. At the end of the 90 day transition period, the successor employer is required to perform a written performance evaluation for each employee and if satisfactory, the successor shall offer the employee continued employment under the terms and conditions established by the successor employer or as required by law. See, DBSWPA Sections (5), (7) and (8) at R Exh 1. Obviously, the fundamental underpinnings of both *Burns* (and its progeny) and DBSWPA were to maintain some degree of employment stability where there is a continuity in both the workforce and the business enterprise. As stated by the Court in *Fall River Dyeing*, where, as here, there is a substantial continuity between the predecessor's operations and a majority of its former employees, it is in the interest of the Act's policy to promote stability in collective bargaining relationships and preserving industrial peace by imposing bargaining obligations.

D. Respondent is a *Burns* Successor

I find that the Respondent is a *Burns* successor. It is not in dispute and the parties stipulated that there is "substantial continuity" between the enterprises to the extent that the business of both employers is essentially the same and the employees of the new company are

doing the same jobs in the same working conditions. While this doctrine involves a multitude of factors, typically, the new employer must “hire a majority of its employees from the predecessor.” *Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 263 (1974). Here, on or about February 17, the Respondent hired seven of the eight predecessor’s employees making up the unit. In addition, the parties stipulated and I find that the employees of the new company are doing the same jobs under the same working conditions. It is also not in dispute that the Union timely requested recognition and demanded bargaining with Respondent (Jt Exh 1, Stipulation ¶ 23); *Armco, Eastern Steel Div., Ashland Works*, 279 NLRB 1184 (1986).

Respondent argues that DBSWPA required it to hire the predecessor’s unit employees and that it would not necessarily have hired a majority of the predecessor’s employees, but for the local municipal law (Tr. at 20-23). Basically, the Respondent argues that it did not make a voluntary and conscious decision to take advantage of its predecessor’s trained workforce and therefore it was not a *Burns* successor. Respondent also apparently argues that any determination of a successorship obligation must be based on circumstances as they existed after the DBSWPA 90 day probationary period. Respondent maintains that only three of predecessor’s employees that were part of the unit remained after the 90-day period and with the hiring of four new employees, there were no longer a majority representative complement of employees from the predecessor for collective bargaining purposes.

The Acting General Counsel argues that Respondent made a conscious decision when it purchased the facilities with an understanding of the requirements of the local ordinance and when it retained some employees and terminated others.

In agreement with the Acting General Counsel, I reject Respondent’s contentions. The Respondent did make a conscious decision to retain the former workforce. That conscious decision was made when the Respondent decided to purchase the facilities as an on-going enterprise with a trained workforce. It knew or should have known that the purchase was conditioned on the application of the DBSWPA. The Respondent also made a conscious decision when it hired seven of the eight former employees. Thus, the bargaining obligation under *Burns* attached on March 7 when the Union made its bargaining demand and at a time when Respondent employed 7 of the 8 employees represented by the Union. That was a full complement because even after the DBSWPA 90 day period ended, Respondent had the same number of employees. The Respondent initially laid-off one employee and discharged three at the end of the 90 day period in a transparent effort to dilute the Union’s majority and evade its successorship bargaining obligation. But, immediately thereafter, it hired 4 new employees to bring the complement back up to where it was before the end of the DBSWPA period.

Board law clearly recognizes that, in similar circumstances, obligations under local law do not permit an employer to escape its successorship obligation.

For example, the Board in *Springfield Transit Management*, 281 NLRB 72 (1986), the Board affirmed the Administrative Law Judge’s decision on the obligation of a new employer to recognize and bargain with the bargaining representative of the predecessor’s employees mandated by a federal agreement with the new employer. In *Springfield Transit Management*, the federal Urban Mass Transportation Act (“UMTA”) provided federal grants to local municipal mass transit systems conditioned on protecting the rights of employees. As part of providing a grant, the Springfield Transit Management (“STM”) agreed and was required to hire all incumbent workers when it took over the management of the public bus service from the Pioneer Valley Transit Authority. The Administrative Law Judge found, and the Board affirmed that since STM was bound to hire all of the office clerical personnel pursuant to an UMTA

agreement, "...the Respondent was bound to also recognize their collective bargaining representative and to negotiate terms and conditions of employment with the representative."⁷ *Springfield Transit Management*, 281 NLRB at 78.⁸

5 The intent of DBSWPA is to ensure some normalcy of job security during a time of economic instability in the New York real estate industry. NLRBA Section 8 (a) (1) and (5) was designed to ensure the free engagement of collective bargaining without interference, restraint or coercion. Contrary to the Respondent's arguments, these two principles are not inapposite.⁹ The illogical conclusion of Respondent's arguments would mean that the New York DBSWPA would preempt the NLRBA by denying the rights of employees to collective bargaining who previously were represented but for the local ordinance. DBSWPA was never intended to circumvent the collective bargaining rights of employees. It simply flies against logic to allow new employers to discharge employees with years of seniority after the 90 day probationary period and this would not serve or preserve stability in the building service industry as intended by DBSWPA.

20 The fact that a local ordinance has a compulsory retention policy does not alter the application of the successorship doctrine. The successorship doctrine serves the policies of the Act by preserving stability in the collective bargaining relationships and preserving industrial peace. The successorship doctrine is satisfied when two elements are met, to wit: 1) there is a substantial continuity of operations after the takeover and 2) if a majority of the new employer's workforce in an appropriate unit, consists of the predecessor's employees at a time when the successor has reached a substantial and representative complement. *Fall River Dyeing*, 482 U.S. 27, 43. Here, Respondent hired seven of the eight predecessor's employees. Conway testified that they were not probationary employees when hired on February 17. But even if they were probationary employees, the Board has previously determined that probationary employees enjoy the same under the Act's Section 7 rights as permanent employees. See, *Denham I*, 206 NLRB at 660 (1973).

30 It is clear that a self-serving probationary period imposed by the new employer on the majority of the predecessor's employees would not defeat an obligation to bargain.

35 In *S & F Market Healthcare, LLC d/b/a as Windsor Convalescent Center of North Beach*, 351, NLRB 975 (2000), enf. denied in part on other grounds, 570 F.3d 354 (D.C. Cir. 2009), the employer purchased a skilled nursing home facility and retained approximately seventy-five percent of the predecessor's workforce as temporary employees. Each temporary employee was employed for a 90-day period in which time their performance was evaluated and offered

40 ⁷ While the employer may have made an independent decision to hire the predecessor's employees, the Administrative Law Judge correctly found that regardless, "...the obligation to offer jobs to (SSRC) employees was also a legal requirement set forth in undertakings by which STM was bound." *Springfield Transit Management*, 281 NLRB at 78.

45 ⁸ Respondent relied heavily on *M&M Parkside Towers, LLC*, 2007 WL 313429 (January 30, 2007), that a majority of the predecessor's employees could only be calculated after the 90 day probationary period had concluded when the former employees were made permanent by the new employer. However, *M&M Parkside Towers* was not adopted by the Board and has no administrative precedence herein. But to the extent that Respondent's arguments must be addressed, I find, and Conway testified, that the employees hired were permanent employees and not probationary.

50 ⁹ The Respondent has not argued, and it is not before me, that DBSWPA should be pre-empted by the NLRB Act. The pre-emption doctrine should not be lightly inferred even though the local ordinance requirements may suggest impingement on national labor relations' pre-emptive laws and regulations. See, *Fort Halifax Packing co. v. Coyne*, 482 U.S. at 21 (1987).

permanent employment to those with satisfactory performance reviews. When the union demanded bargaining, the employer refused. The Board found that the obligation to bargain attached when S & F hired the temporary employees because “a work force continuity determination is not deferred until after the completion of a probationary period.”

5 In *Sahara Las Vegas Corp*, 284 NLRB 337 (1987), a casino was sold to the Sahara Las Vegas Corporation. Three days prior to the taking over of operations, Sahara informed the union president that the union would not be recognized until the casino was fully staffed, and that the employees were subjected to a 90-day probationary period. Sahara Las Vegas
10 retained a majority of the predecessor’s employees and refused to bargain with the union until after the 90 day period. The Board found Sahara Las Vegas was a *Burns* successor and obligated to bargain at the beginning of the 90 day period. The Board stated “the unilaterally imposed probationary period has no legally cognizable significance on the legal obligation of a successor employer to recognize and bargain with an exclusive employee representative.” I
15 strongly believe that to hold otherwise would embolden new employers after a takeover of operations to impose arbitrary probationary periods on the predecessor’s employees to defeat the recognition and bargaining rights of unions. This would allow for the same conclusion in this instance where a compulsory local ordinance with an arbitrary 90-day probationary period would circumvent public policy and undermine the right of workers to designate a representative for
20 collective bargaining under Section 1 of the Act.¹⁰ Similarly, in *The Clarion Hotel-Marin*, 279 NLRB 481 (1986), the Board found that there was no basis to delay resolution of the majority question when the Respondent argued that its bargaining obligation should be delayed until the conclusion of a 90-day probation period.

25 I find that the new employer’s bargaining obligation attached when the majority of Respondent’s substantial and representative employee complement was composed of the predecessor’s employees and when the Union had demanded to bargain on March 7. I find that under *Burns* and *Fall River*, supra, Respondent’s bargaining obligation attached on March 7 when the majority of the Respondent’s substantial and representative employees complement
30 was composed of the predecessor’s unit employees and when the Union made a clear and unequivocal demand to bargain.

I find that Respondent properly took action to set initial terms and conditions of employment which were different from those under the predecessor employer before incurring
35 an obligation to recognize and bargain with the Union prior to March 7. As such, the GVS properly initiated unilateral terms and conditions of employment without committing an unfair labor practice. *NLRB v. Katz*, 369 U.S. 736 (1962).

40 But I also find that GVS was obligated to recognize and bargain with the Union after the demand to bargain was made by the Union on March 7 and violated Section 8(a)(1) and (5) of the Act when Respondent failed to recognize and refuse to bargain with the designated Union. As of March 7, GVS maintained 1) substantial continuity of its predecessor’s operations; 2) had

45 ¹⁰ One may argue in the *S & F Market Healthcare* and *Sahara Las Vegas* cases that the new employers chose to hire the probationary employees and were not mandated to do so. But in this instance, a close reading of DBSWPA also allows for a degree of discretion to hire the predecessor’s employees. GVS could have agreed and assumed the predecessor’s collective bargaining agreement [Section d] and decided to discharge and lay-off employees consistent with that agreement; GVS could
50 have laid-off the predecessor’s employees based upon operational needs [Section (a) (6)]; or GVS could have terminated employees for cause during the 90-day probationary period [Section (a) (7)].

hired a substantial and representative complement of the predecessor's employees; and 3) the Union had made a demand to bargain. Even in circumstances, as here, where an employer has properly set initial terms, employers still have an ongoing obligation to bargain with a union over any subsequent changes to terms and conditions of employment. *301 Holdings, LLC*, 340 NLRB 366 (2003).

Conclusions of Law

1. Respondent is an employer engaged in commerce or an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. District 15, Local Lodge 447 of the International Association of Machinists and Aerospaceworkers, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material herein, Local 447 has been and is the exclusive representative of the building and maintenance employees employed by GVS Properties, LLC, for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

4. By refusing to recognize and bargain with the Union following the March 7, 2012 demand to bargain, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The recommended Order will require Respondent to cease and desist from bypassing the Union as the representative of all its full-time superintendents and porters (also known as maintenance technicians and maintenance assistants respectively) and excluding all other employees, clerical employees, managerial employees, guards and supervisors as defined by the National Labor Relations Act employed at the following addresses in New York, New York: 601 West 139th Street; 6104 West 157th Street; 600 West 161st Street; 559 West 164th Street; 701 West 175th Street; 700 West 176th Street; and 667 West 177th Street AND will require it to bargain collectively and in good faith with the Union as the exclusive representative of its employees.¹¹

Order

The Respondent, GVS Properties, LLC, its officers, agents, successor, and assigns, shall

1. Cease and Desist from

¹¹ The Charging party, as a remedy, requested that GVS rescind any changes to the employees' terms and conditions of employment implemented since March 7 and make whole any affected employees. However, the allegation that there may have been improper changes in the wages, terms and conditions of employment after March 7 was not alleged in the Complaint and no evidence substantiating this allegation was presented or litigated at the trial. Therefore, I find that it would be inappropriate to order this remedy. In any event, any such changes, if they were indeed implemented, may form the basis of additional charges that may be litigated in a subsequent proceeding.

(a) Refusing on and after March 7, 2012, to bargain collectively with District Lodge 15, Local Lodge 447 of the International Association of Machinists and Aerospace Workers, AFL-CIO, as the exclusive collective-bargaining representatives of its full-time superintendents and porters (also known as maintenance technicians and maintenance assistants respectively) and excluding all other employees, clerical employees, managerial employees, guards and supervisors as defined by the National Labor Relations Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes and policies of the Act.

(a) Recognize and, on request, bargain collectively with District Lodge 15, Local Lodge 447, International Association of Machinists and Aerospace Workers, AFL-CIO as the exclusive representative of its full-time its full-time superintendents and porters (also known as maintenance technicians and maintenance assistants respectively) and excluding all other employees, clerical employees, managerial employees, guards and supervisors as defined by the National Labor Relations Act.

(b) Within Fourteen (14) days, post at all the New York, New York facilities, *to wit*: 601 West 139th Street; 6104 West 157th Street; 600 West 161st Street; 559 West 164th Street; 701 West 175th Street; 700 West 176th Street; and 667 West 177th Street, a copy of the attached notice marked "Appendix."¹² Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, or sold the business or the facilities involved herein, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 7, 2012.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated: Washington, D.C., December 27, 2012.

Kenneth W. Chu
Administrative Law Judge

¹² If this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

WE WILL NOT refuse to bargain with District Lodge 15, Local Lodge 447 of the International Association of Machinists and Aerospace Workers, AFL-CIO as the exclusive representative of the employees in the bargaining unit of all its full-time superintendents and porters (also known as maintenance technicians and maintenance assistants respectively) and excluding all other employees, clerical employees, managerial employees, guards and supervisors as defined by the National Labor Relations Act and employed at the following addresses in New York, New York: 601 West 139th Street; 6104 West 157th Street; 600 West 161st Street; 559 West 164th Street; 701 West 175th Street; 700 West 176th Street; and 667 West 177th Street.

WE WILL NOT refuse to bargain with Local Lodge 447, by unilaterally changing, without notice and an opportunity to bargain, terms and conditions of employment that existed as of March 7, 2012.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the rights guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL bargain collectively in good faith with Local Lodge 447, International Association of Machinists and Aerospace Workers, AFL-CIO, as the exclusive representative of the employees in the appropriate bargaining unit noted above and put in writing and sign any agreement reached on terms and conditions of employment.

GVS PROPERTIES, LLC

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

One MetroTech Center (North), Jay Street and Myrtle Avenue, 10th Floor

Brooklyn, New York 11201-4201

Hours: 9 a.m. to 5:30 p.m.

718-330-7713.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 718-330-2862.